

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NEKEAL JONES,

Defendant-Appellant.

UNPUBLISHED

December 21, 1999

No. 204768

Recorder's Court

LC No. 96-09628

Before: Neff, P.J., and Murphy and J.B.Sullivan*, JJ.

PER CURIAM.

Defendant Nekeal Jones was charged with three counts of assault with a deadly weapon, MCL 750.82; MSA 28.277, and one count of possession of a firearm in the course of committing a felony, MCL 750.227b; MSA 28.424(2). Following a four-day jury trial, defendant was acquitted of one of the counts of assault with a deadly weapon and the felony-firearm count, but convicted of the lesser offenses of intentional discharge of a firearm at another without malice, MCL 750.234; MSA 28.431, and injury by intentional discharge of a firearm at another without malice, MCL 750.235; MSA 28.432. Defendant was sentenced to two years' probation, and now appeals as of right. We affirm.

This appeal arises from an incident which occurred in Detroit in the early morning hours of August 24, 1996. The three complainants, Ryan Mullins, Gerald Jaynes, and Clinton Slago, were teenagers who had gone to the Rainbow Party Store to find someone to buy whiskey for them. They found a person who would make the purchase, gave her the money, and waited for her to emerge from the store. Meanwhile, defendant, an off-duty Detroit police officer, and his fiancée had arrived at the store in his truck to buy beer. While defendant was inside the store, his fiancée, who had remained in the truck, overheard Slago and another person, Fred Watson, having a conversation. She spoke with Slago about his use of derogatory terms for women. While she and Slago were speaking, defendant emerged from the store. He told Slago not to talk to his fiancée, and to move away from his truck. Slago and defendant exchanged words, and Watson stepped between the two men attempting to stop them from fighting. Watson's attempts were unsuccessful and the exchange escalated into a fistfight. During the course of the fight, Watson saw defendant's gun and badge. Defendant was knocked down

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

two or three times by Slago. The last time defendant was knocked down, his shirt went up and Slago saw his gun. Slago fled, running across Eight Mile Road, and defendant fired several shots at him. After Slago fled, defendant saw Mullins' van in which Jaynes was sitting as a passenger. Defendant went to the passenger side of the van, reached in the window and attempted to pull Jaynes out of the van. Jaynes kicked defendant and hit him several times over the head with the whiskey bottle which had just been purchased. As Mullins began to drive the van, defendant let go and fell from the van as it pulled out of the parking lot onto Eight Mile. As the van pulled away, defendant fired a number of shots at the van, hitting Mullins with one of the bullets.

Defendant requested an instruction on the common-law defense of use of deadly force to stop a fleeing felon. His requested instruction was based on his testimony that he shot at Slago because Slago had committed felonious assault during the fight with defendant, and he shot at the van because Jaynes committed felonious assault when he hit defendant with the bottle. Defendant also claimed that he had identified himself as a policeman to complainants Slago, Mullins and Jaynes, but this testimony was contradicted by complainants. Watson, who tried unsuccessfully to stop the fight between Slago and defendant, testified that he saw defendant's badge during the fight, and that defendant's fiancée had said during the fight that defendant was a police officer. The court instructed the jury on the "fleeing felon" defense with respect to Slago, but not with respect to the counts involving Mullins and Jaynes.¹ Defendant was acquitted of the count involving Slago, but convicted of the lesser offenses involving Mullins and Jaynes.

We review defendant's claim that the court should have instructed the jury on the "fleeing felon" defense as to all three complainants by examining the jury instructions in their entirety. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997). Jury instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them. *Id.* An instruction that is without evidentiary support should not be given. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999).

The use of deadly force to prevent the escape of a fleeing felon is justifiable where the following three circumstances are present: (1) the evidence must show that a felony actually occurred, (2) the fleeing suspect against whom force was used must be the person who committed the felony, and (3) the use of deadly force must have been "necessary" to ensure the apprehension of the felon. *People v Hampton*, 194 Mich App 593, 596-597; 487 NW2d 843 (1992). The right of a police officer to use deadly force to stop a fleeing felon is the same as that of a private citizen, with the exception that a police officer may use deadly force if he reasonably believed that (1) a felony occurred, and (2) the fleeing suspect was the person who committed the offense. *People v Fielder*, 194 Mich App 682, 693-694; 487 NW2d 831 (1992); *People v Whitty*, 96 Mich App 403, 411; 292 NW2d 214 (1980).

In this case, there was some evidence that supported the conclusion that Slago had committed a felonious assault on defendant. As a result, the "fleeing felon" instruction was properly given as to the count involving Slago. However, there was no evidence that either Mullins or Jaynes committed a felony. The evidence was uncontroverted that Mullins and Jaynes were in no way involved in the fight between Slago and defendant, and defendant admitted that the only reason he tried to drag Jaynes out of Mullins' van was that Mullins and Jaynes could identify Slago. We agree with plaintiff that "[t]here is

no ‘fleeing witness’ rule.” Moreover, an individual may use reasonable force to resist an unlawful arrest. See *People v Eisenberg*, 72 Mich App 106, 111; 249 NW2d 313 (1976). The right to resist an unlawful arrest is analogous to the right to self-defense. *Id.* A defendant has the right of self-defense where circumstances cause him to reasonably believe that there was a present and impending necessity to act in order to prevent the infliction of great bodily harm. *People v Lenkevich*, 394 Mich 117, 124; 229 NW2d 298 (1975).

In this case, Jaynes had seen defendant shooting at his friend immediately before defendant tried to pull him out of the van. The evidence is uncontroverted that there was no legally cognizable justification for defendant’s entering the van and attempting to drag Jaynes out. Even assuming that defendant announced to Jaynes and Mullins that he was a police officer, we conclude that Jaynes’ reaction, given the uncontroverted evidence in the case, was a legal use of force to resist arrest. Jaynes’ use of force in hitting defendant with the whiskey bottle could not reasonably be considered a felony, and defendant had no right to shoot at the van to stop a fleeing felon. The court did not err in refusing to give a “fleeing felon” instruction.

Affirmed.

/s/ Janet T. Neff

/s/ William B. Murphy

/s/ Joseph B. Sullivan

¹ Plaintiff contends that defendant acquiesced in the failure to give the instruction as to Mullins and Jaynes. We have examined the portion of the record to which plaintiff refers. Defendant’s “acquiescence” was only an agreement as to the particular form of the instruction the court gave on felon in flight as it applied to the case involving Slago.